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POLITICAL SCIENCE QUARTERLY.

THE TELEGRAPHS OF THE BOND-AIDED PACIFIC RAILROADS.¹

THE Pacific Railroad Acts of July 1, 1862, and July 2, 1864, subsidized or both chartered and subsidized certain railroad and telegraph lines between the Missouri River and the Pacific Ocean.² Congress appears to have contemplated nothing else than that the same corporations should perform both sorts of functions—that railroad and telegraph should be operated as one harmonious whole. No duality of agencies was so much as hinted at. The language of the acts is clear and unequivocal. The Union Pacific Railroad Company, *e.g.*, is “authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph.”³ Further on in the same section this corporation is spoken of as the “Union Pacific Railroad and Telegraph Company.” Lands are to be patented and bonds issued to this and the other companies aided by the acts, on the completion of

[¹ This article had been accepted by the QUARTERLY, and the manuscript was in the hands of the author for final revision, when he lost his life by the sad drowning accident in Cayuga Lake, November 18, 1893. The solid qualities of which the study gives evidence reveal only too clearly the loss which science and scholarship have sustained in the writer's death at the very opening of his career. — EDS.]

² They were the Union Pacific, Bridge Junction, Omaha, Neb., to five miles west of Ogden, Utah, 1034.48 miles; Kansas Pacific, Kansas City, Mo., to a point near Boaz, Kan., 393.94 miles; Central Pacific, five miles west of Ogden to San José, Cal., 860.66 miles; Sioux City and Pacific, Sioux City, Ia., to Fremont, Neb., 101.77 miles; and Central Branch Union Pacific, Atchison, Kan., to Water-ville, Kan., 100 miles.

³ The words railroad and telegraph appear in connection in the act of 1862 nearly forty times.

twenty-mile¹ sections of railroad and telegraph line. These bonds are to constitute a second² mortgage "on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description." A principal condition of the government grants of lands and credit to each aided line is that

said company shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service).³

In the services to be rendered for the government it will be noticed that no distinction is made between the transmission of telegrams and the transportation of troops and commodities. One-half⁴ of the compensation for these services is to be retained by the government and applied to the payment of the principal and interest of the bonds loaned the railroads. In addition, five per cent of net earnings is to be put to the same use.

No further examination of the acts of 1862 and 1864 is necessary to show that Congress in passing them had no intention of divorcing in any manner railroad and telegraph, or had even a thought that they would ever be divorced. They were divorced nevertheless. And it is the object of this article to tell the story of the divorce and of the attempts to re-wed

¹ "Forty" according to the act of 1862, but "twenty" by the act of 1864.

² "First" by the act of 1862, but "second" in that of 1864.

³ Act of 1862, section six.

⁴ The whole, according to the act of 1862, but changed to a half by the act of 1864. The Thurman Act, May 7, 1878, again directed the retention of the whole, one-half to be applied to interest payments, and one-half to be turned into the sinking fund created by the act. But the Thurman Act applies only to the Central Pacific and the Union Pacific Railroad Companies, not to the Kansas Pacific (now a part of the Union Pacific Railway) and the other bond-aided roads.

them. Of the history which is common to both railroad and telegraph, and which might well be made to fill volumes, the essay will not treat. It will deal only with that which is peculiar to the telegraph, and with this only in its legal and governmental aspects.

I.

On the sixteenth of June, 1860, Congress passed an act¹ "to facilitate communication between the Atlantic and Pacific states by electric telegraph," which directed the secretary of the treasury to obtain for the government, by award to the lowest bidder or bidders, the use for a period of ten years of a telegraph line from the western border of Missouri to San Francisco. The maximum payment of \$40,000² per year authorized by the act secured the speedy completion of the desired line.³ By the autumn of 1861 telegraphic communication was established with the Pacific coast. It is this line of telegraph already in operation that is referred to in the nineteenth section of the act of July 1, 1862; the three companies there mentioned—the Pacific Telegraph Company, the Overland Telegraph Company and the California State Telegraph Company—being the builders of the line.⁴ Although the act of June 16, 1860, declared that nothing therein conferred "upon the said parties any exclusive right to construct a telegraph to the Pacific," or debarred the government of the United States "from granting from time to time similar franchises and privileges to other parties," yet when the act of July 1, 1862, was under consideration in Congress, it was urged that the government, in locating and subsidizing a new Pacific tele-

¹ 12 Statutes at Large, 41.

² The state of California also granted a subsidy of \$100,000.

³ If the amount of business done for the government exceeded \$40,000, the excess was to be certified to Congress by the secretary of the treasury; the expectation, of course, being that Congress would make an appropriation for it.

⁴ These companies, however, were but the instruments through which the Western Union Telegraph Company worked. The contract for the construction of the Pacific telegraph was made by Hiram Sibley, president of the Western Union, at the direction and for the benefit of the Western Union, which corporation in time absorbed the companies mentioned.

graph, was acting in bad faith toward the old telegraph, which would be ruined by the competition of the new ; and it was therefore proposed to prohibit the latter from doing a general telegraphic business, and to restrict it to the transmission of railroad and government telegrams. But this proposal was rejected on the ground that competition was desirable. Nevertheless, section 19 of the act opened a way whereby competition could be avoided and harmony of interests secured. This section, which permitted the removal of the old telegraph to and along the line of the railroads, allowed the railroad companies, by arrangement with the owners of the old telegraph, to substitute it for the new one required by the act. But, though the old telegraph was removed to the line of the railroads, most of the railroad companies neglected to make use of this permission and built telegraphs of their own.¹

In the act known as the "Idaho Act," to provide "increased facilities of telegraphic communication between the Atlantic and Pacific States and the Territory of Idaho," passed the same day as the second Pacific Railroad Act, July 2, 1864, Congress authorized the United States Telegraph Company to construct a line or lines of magnetic telegraph from the Missouri River to San Francisco. With change of names the provisions of the fourth section of this act are the same as those of the nineteenth section of the act of July 1, 1862. The telegraph line of the Kansas Pacific Railway² was constructed from the Missouri River to Lawrence, Kansas, by the same contractor who built that part of the railroad. For some fifty miles further west the line was continued by the United States Telegraph Company and the railroad company jointly, but under what exact arrangement was not disclosed. In February, 1866, this telegraph company was consolidated with the

¹ The Kansas Pacific and the Central Branch Union Pacific, comprising 494 out of 2,491 miles of bond-aided roads, were the only companies that did not build independent lines of telegraph.

² Spoken of in the act of 1862 as the Leavenworth, Pawnee and Western R. R. In 1863 its name became the Union Pacific Railway, Eastern Division, and by resolution of Congress of March 3, 1869, it finally became the Kansas Pacific Railway.

Western Union ; and the latter, with the railroad company, under an arrangement formulated in a contract of October 1, 1866, completed the telegraph line to Denver.¹

This contract between the Kansas Pacific and the Western Union was drawn for twenty-five years and provided for the joint construction, maintenance and operation of the telegraph. By it the railway company was to have what wires were necessary for its own business, but all commercial business was reserved for the telegraph company. The Kansas Pacific agreed, so far as it could legally do so, to refuse right of way along its road to any other telegraph company than the Western Union, and to transport men and materials for any other company only at regular rates. The tenth section of the contract ran thus :

The telegraph company agrees to perform without charge for the railway company what shall be decided by competent authority to be its telegraph obligations to the government of the United States.

The telegraph of the Central Branch Union Pacific Railroad was built under a contract made with the Western Union in 1867 that much resembled the contract between the Kansas Pacific and the Western Union ; it provided for the joint construction and operation of the line, but the conduct of the business and the power of fixing rates were given to the Western Union.

“ Finding the operation of a telegraph line only 100 miles long, when managed independently of other connecting lines, failed to give the public the proper telegraphic facilities,”² the Sioux City and Pacific Railroad, on April 1, 1871, for the sum of \$6,420, transferred its telegraph rights to the Western Union, under a contract having the same essential features as those just described.

As has been said, the line of telegraph from the Missouri River to the Pacific Ocean, built under the act of June 16,

¹ U. S. *vs.* W. U. Tel. Co. *et al.*, 50 Fed. Rep. 28.

² From a letter of the general manager to the commissioner of railroads, January 28, 1884.

1860, was moved to and along the right of way of the Central Pacific and Union Pacific Railroads. Prior to 1878 the Central Pacific and Western Union lines, though side by side, were operated independently of each other. But on the 14th of December, 1877, the Central Pacific, together with the Southern Pacific and a number of smaller companies likewise under the control of the Central Pacific, entered into an agreement with the Western Union "to unite their several telegraph lines and operate the same under one management and as one system." The contract was made to take effect January 1, 1878, and to continue in force five years, after which time it was terminable on a year's previous notice by either party. The Western Union agreed to pay in United States gold coin to the railroad companies \$80,000 for the first year, \$85,000 for the second year, \$90,000 for the third year, \$95,000 for the fourth year, and \$100,000 for each year thereafter during the continuance of the contract, these payments to be divided among the railroad companies upon such a basis as they should agree on. Of this contract, which still governs the relations of the Central Pacific and the Western Union, it may be said that under the system of joint administration established by it each party is assigned its own proper duties, and that, like the other contracts between the Western Union and the bond-aided roads, it operates to throw the commercial telegraphic business into the hands of the Western Union.

The Union Pacific Railroad Company, like the other bond-aided roads, early divested itself of the full control of its telegraph line; but its arrangements were made, not with the Western Union, but with the Atlantic and Pacific Telegraph Company. In an original and a supplemental contract, of dates September 1, 1869, and December 14, 1871, the Union Pacific leased to the Atlantic and Pacific its telegraph lines and everything it had pertaining to the telegraph business, for the term of its charter and renewals thereof, subject to the rights of the United States as set forth in the charter of the railroad company, and on condition that the telegraph company would perform all the duties imposed upon the railroad

company by its charter or by the laws of the United States. The Union Pacific received 17,800¹ shares of Atlantic and Pacific stock, which it subsequently disposed of for about \$450,000. A sort of joint maintenance and operation of the telegraph was contemplated by the contract, its provisions, however, being such that the commercial business should all be done by or for the telegraph company.

II.

Thus matters stood with the bond-aided railroads and their telegraphs in January, 1880, the point at which the efforts of Mr. Jay Gould effected the consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company into the Union Pacific Railway Company. Mr. Gould was in control of the Union Pacific and was also interested in the American Union Telegraph Company, which he had organized and for the business of which he was seeking western connections. Such connections were rendered impossible by the contracts of the bond-aided roads with the Western Union and the Atlantic and Pacific. These two companies were now working in harmony and were soon to be consolidated. The interests of the American Union could only be secured, therefore, by getting rid of the contracts. It was determined that the Union Pacific should resume the operation of its own telegraph lines, with a view to their employment for the purposes of the American Union. In accordance with this plan, President Eckert, of the American Union, on February 17, 1880, made a formal demand on the Union Pacific for exchange of telegraphic business on terms as favorable as were granted by the latter to any individual or corporation, basing his demand on the Congressional acts creating the railway companies. The counsel for the Union Pacific, Messrs. Sidney Bartlett and John F. Dillon,

¹ But 1,800 of them were for a debt owed by the Atlantic & Pacific to the Union Pacific.

advised compliance with this demand. Their opinion declared that under the laws of Congress the contracts by which the telegraph business was turned over to other companies were void. The duties of the bond-aided corporations in respect to telegraph, as in respect to railway business, were by their charters personal, and hence inalienable without express legislative authority. Any contract devolving these duties on others was *ultra vires*.

The advice of its counsel was quickly followed by the Union Pacific, both on its main line and on the Kansas Pacific. Formal notice was served on the Western Union that the Union Pacific would itself operate and use its telegraph lines, "placing all companies and persons upon equal footing, giving equal rights to all, and exclusive or favored privileges to none." On the 27th of February, by taking possession of telegraph lines, cutting connecting wires and other drastic proceedings, expression was given of a purpose to terminate existing arrangements with the Western Union. The telegraph companies promptly secured temporary injunctions restraining the Union Pacific from carrying out its purposes, and in several cases the injunctions were made permanent. But a general and definitive settlement of the issues was never reached. For in 1881 the Atlantic and Pacific, the Western Union and the American Union companies were consolidated, their jarring interests were brought into harmony and litigation ceased.

The most important judicial opinion rendered during the continuance of this litigation was that of Judge G. W. McCrary, in the United States circuit court for the district of Nebraska,¹ on the motion to make permanent a temporary injunction against the Union Pacific. The principle which should determine as to the validity of the contracts whereby the Union Pacific leased its telegraph property and franchise to the Atlantic and Pacific, was to be found, Judge McCrary said, in the recent case of *Thomas et al. vs. West Jersey Railroad*

¹ *Atlantic & Pacific Telegraph Company vs. Union Pacific Railway Company*, 1 McCrary, 541; 1 Fed. Rep., 745.

Company.¹ In that decision Justice Miller had declared that the charter of a corporation is the measure of its powers, and

that where a corporation like a railroad company has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions — which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burden which it imposes — is a violation of the contract with the state, and is void as against public policy.

Proceeding to apply the principle here enunciated to the present case, Judge McCrary said: "It is certain that the contracts in question amounted to a lease or alienation, by the Union Pacific Railroad Company, of property which was necessary to the performance of its obligations and duties to the government and to the public." The act of 1862 and amendments thereof devolved on the Union Pacific, "individually and personally, the power and duty of constructing, operating and maintaining a line of telegraph as well as a railroad." This is manifest from the fact that the government endowed the corporation with large grants of land and bonds, and required reimbursement from the earnings of the railroad and telegraph. The words "maintain and enjoy," in the authorization "to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph," attest the personal and inalienable character of the powers granted and the obligations imposed.

Continuing, Judge McCrary said:

The very same language which authorizes the construction and operation of the telegraph line also authorizes the construction and operation of the railroad, and the property in the one is as necessary to the performance of the public duties of the corporation as that in the other. The charter of the company, with the amendments, considered as a whole, was manifestly intended to create a corporation which should be personally amenable to the government in the exer-

¹ 101 U. S., 71.

cise of the powers conferred, and which should in quasi-public capacity perform the duties imposed, and render an account of its earnings. The purpose was not to authorize the construction of a line either of railroad or telegraph to be thereafter sold, leased or transferred to other parties, leaving the government to the chance of securing from or through the lessee or vendee its proportion of the earnings.

By its contract with the Atlantic and Pacific, the Union Pacific alienated property which was necessary to the performance of its charter duties to the public and the government, and the clause asserting that the property is still subject to the rights of the government, and requiring that the Atlantic and Pacific shall perform fully and faithfully all the duties imposed and to be imposed by the charter and by acts of Congress, does not make the contract good. The Union Pacific "certainly could not divest itself of these powers and duties and devolve them upon the plaintiff, without express authority from Congress." The contract, therefore, is *ultra vires* and void. This would be the case even if the agreement had not transferred property necessary to the performance of the obligations of the Union Pacific; for the attempt to alienate the telegraph franchise—the right to operate a telegraph line, to fix rates, to charge and collect tolls—would alone render the contract void.

But though an *ultra vires* contract is null and void, yet the rights already acquired under it must be respected. Accordingly, Judge McCrary held that the summary action of the Union Pacific was unlawful. That corporation must not of itself ruthlessly subvert existing relations. Though the contract is void, it is not permissible for one of the parties to set it aside without resort to law, and without regard to moral considerations. The preliminary injunction against the Union Pacific was accordingly confirmed, but with modifications authorizing the Union Pacific to institute legal proceedings "to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust upon principles of equity the accounts between the parties."

The Central Branch Union Pacific, on taking possession of the telegraph along its route, at the same time instituted legal proceedings to have its contract with the Western Union declared void, and an account taken between the parties thereto. On an application for an injunction against the Western Union, heard in the United States court for the district of Kansas, May 8, Judge Foster, following the foregoing opinion of Judge McCrary, declared the contract between the Central Branch Union Pacific and the Western Union *ultra vires* and void. The Western Union, moreover, was enjoined from interfering with the railroad company's possession of the telegraph, on the ground that,

this contract being absolutely void, and the plaintiff having taken peaceable possession of the property, accompanied with legal proceedings to have the contract declared null, and for an account to be taken between the parties, in my judgment the defendant cannot compel a restitution of the property under the contract pending the proceedings.¹

On the Kansas Pacific Railway, now become the Kansas Division of the Union Pacific, the railroad company and the telegraph company had not, as on the main division of the Union Pacific, each built a separate telegraph line.² Here there was only one line, and to its construction both the railroad and the telegraph company had contributed.³ Consequently the legal questions involved were somewhat different. The obligations of the Kansas Pacific and the Union Pacific (main line) to construct and operate a telegraph were the same under the acts of 1862 and 1864. But in the case of the Kansas Pacific another act of Congress, the so-called Idaho Act of July 2, 1864, was pertinent, and it was upon the fourth section of this act that the decision of the suits brought against the Kansas Pacific principally turned. Let us now consider these suits in detail.

¹ 1 McCrary, 556.

² The same was true of the Central Branch Union Pacific. *Supra*, p. 189.

³ See contract, *supra*, p. 189.

The action of the Kansas Pacific in taking possession of the telegraph along its line of railroad, February 27, 1880, came up for consideration before Judge Hallett, in the United States district court in Colorado.¹ The contention of counsel for the Kansas Pacific that the contract with the Western Union was void, as exceeding the powers of the company under the acts of Congress, was held by Judge Hallett to be wholly irrelevant. The Western Union had not acted "under or in pursuance of the authority given to the railway in respect to telegraph lines," but under the authority of its charter as a New York corporation. Moreover the Kansas Pacific might legally make such a contract with the Western Union or with any number of telegraph companies. And the contracts would be valid and enforceable; for they were apart and aside from the obligations of the Kansas Pacific to the government in respect of a telegraph line. The question of those obligations was not involved in this suit.² The validity of the contract must be assailed on other grounds. That provision of the contract which gave the Western Union the exclusive right of way along the Kansas Pacific was in contravention of the act of Congress of July 24, 1866, granting to every telegraph company chartered by a state the right of way along all railroads of the United States. Here, then, was a weak point; but the whole contract was not thereby invalidated. The provision in the contract which in the opinion of Judge Hallett rendered the whole instrument void was that which declared that the personal messages of executive officers of the railroad company should be transmitted partly or wholly free of charge. The Kansas Pacific undoubtedly had the right to rescind the contract on this ground. "But," said the court, "rescission does not mean that either party may appropriate to its own use the joint property of both, acquired under the contract, without pay therefor." The rights of each party acquired pursuant to the contract must be respected. The forcible seizure of the

¹ 4 Fed. Rep., 284-292.

² How divergent this opinion is from the opinion of Judge McCrary in *Atlantic & Pacific vs. Union Pacific*, it is unnecessary to point out.

telegraph lines was as illegal as if the contract were without objection. The court, therefore, granted the injunction.

Only a part of the Kansas Pacific Railway, and that a minor part, is situated in Colorado, while the major part, including all of the bond-aided portion,¹ lies in Kansas. And it was in this state that the attempt of the railroad company to set aside the contract with the telegraph company occasioned the most litigation. An injunction against the Kansas Pacific having been obtained in a state court, and that court having refused to dissolve it, the case was removed into the United States circuit court for the district of Kansas. Here District Judge Foster overruled an application to dissolve the injunction. A similar application was made to the same court in session before Judges McCrary and Foster, June, 1880.² Judge McCrary held that, though the Kansas Pacific was not created by the Pacific Railroad Acts, but had been originally chartered by the legislature of Kansas, yet by accepting those acts and receiving their benefits it had become subject to all the terms and conditions imposed by them. In its contract with the Western Union the Kansas Pacific had virtually divested itself of the right to do telegraphic business for the public. In accordance with the decision in *Atlantic and Pacific vs. Union Pacific* this contract, therefore, was *ultra vires* and void so far as the acts of 1862 and 1864 were concerned. Hence the Western Union must find some other ground to stand on. This was found in the Idaho Act. It was claimed by counsel for the Western Union, though not averred in the bill, that the Western Union was the assignee and successor of the United States Telegraph Company, whose telegraph the fourth section of the Idaho Act permitted the bond-aided roads to substitute for the telegraph which they themselves would otherwise have to build; and that as such it had a right to be on the Kansas Pacific. Judge McCrary said that he did not have the data on which to found an opinion as to the claim of the Western Union to be the successor of the United States

¹ The company received land grants for the whole length of its road.

² *W. U. Tel. Co. vs. U. P. Railway Co.*, 1 McCrary, 418; 3 Fed. Rep., 1.

Telegraph Company ; but, assuming the claim to be true, he held that the contract in question between the Western Union and the Kansas Pacific was authorized by the Idaho Act.¹ But neither this nor any other act could warrant the provision for the free transmission of messages for the executive officers of the railroad company. That provision would invalidate any contract, since it tainted the contract with immorality, by virtually offering the executive officers of the company a bribe to give their consent to it. Equitable relief could not be claimed under an immoral contract: the parties must be left where the court found them. The Western Union would have to show a better right to retain possession of the telegraph line than this contract. It was accordingly given leave to file an amended bill, the injunction being continued for the meantime. Judge Foster did not express an opinion on the Idaho Act, but concurred with Judge McCrary that aside from that act the contract was void both as being *ultra vires* and as being immoral.

In pursuance of the leave given by Judge McCrary, the Western Union filed an amended bill, designed to show a right to retain possession of the telegraph line on the Kansas Pacific despite the vicious clause in the contract.² It was averred that the United States Telegraph Company had built and was operating nearly one hundred miles of telegraph on the Kansas Pacific, and was engaged in building more, when its right so to do passed by assignment to the Western Union. Judge McCrary was convinced that the averment showed these rights so to have passed.³ Besides the property in the telegraph line obtained from the United States Telegraph Company prior to the contract with the Kansas Pacific, the Western Union had, according to the allegations of counsel, expended large sums on the line since the making of the contract. And thus in these

¹ Judge McCrary rejected the view that the fourth section of the Idaho Act relieved the railroad companies only of the construction and not of the operation of a telegraph line.

² *W. U. Tel. Co. vs. U. P. Railway Co., et al.*, 1 McCrary, 558; 3 Fed. Rep., 423.

³ He did not share in the opinion that the privileges of the United States Telegraph Company conferred by the Idaho Act were personal and inalienable, and consequently unassignable to the Western Union.

two ways Judge McCrary thought the Western Union had acquired equitable rights in the property which a court might not overlook. But, as to that portion of these rights which had been acquired under the contract, it is evident that Judge McCrary was at variance with his former opinion that, since the parties to an immoral contract could not claim equitable relief, the court must leave them where it found them. The result of this hearing was that Judge McCrary continued the injunction, but granted permission to the defendants to answer if they saw fit.

The last hearing in these injunction proceedings was had before Judge McCrary and Justice Samuel F. Miller, October 1, 1880, Justice Miller delivering the opinion.¹ The opinion in the main agreed with the opinions of Judge McCrary delivered on previous hearings. Justice Miller, like Judge McCrary, thought that the obligation in respect to telegraph business imposed by the Pacific Railroad Acts was inconsistent with the contract involved in this case, and that the only firm footing for the plaintiff was afforded by the Idaho Act. He did not, however, accept as conclusive the evidence offered concerning the corporate existence of the United States Company and the succession of the Western Union to its rights. But his doubts here were not so strong as to justify a decision adverse to the Western Union. As to the effect of the clause giving free transmission to despatches of the executive officers of the Kansas Pacific, he was not so sure that it tainted the contract with immorality. The term executive officers itself was ambiguous; the presumption of corrupt motives, which the attempt to conceal this clause from the stockholders or from others interested would create, was wanting; "the benefits secured did not flow to the individual, but to the office"; and there was no evidence before the court that the privilege "was enjoyed for any length of time by any one individual, or that it amounted in point of fact to a pecuniary sum whose influence would be at all appreciable."

Justice Miller dwelt upon the disastrous consequences that would ensue if the two injunctions covering, respectively, the

¹ *W. U. Tel. Co. vs. U. P. Railway Co., et al.*, 1 McCrary, 581; 3 Fed. Rep., 721.

lines of telegraph from Kansas City to Denver and from Omaha to Ogden, were dissolved at the behest and for the benefit of a rival company. The Western Union, he said

has done the business of almost the entire country for many years past west of the Allegheny Mountains — all the business west of the Missouri River. . . . The total suspension of its business for the period of time necessary to construct a line from Omaha or Kansas City to Ogden would produce an irreparable injury, within the meaning of the term as used in equity proceedings. It would be an injury to that company by no means commensurate with any good to result to the other company which is in contest with it. . . . I have a strong belief that it is the duty of the court to keep the hands of both of these parties so tied up, and so far at liberty only as that the public shall not suffer and each shall not destroy the other, until this litigation shall come to a final close by a full hearing on the merits of the case.

The “full hearing” was never held ; for, as has been stated,¹ the litigation was ended by the consolidation of the three telegraph companies.

III.

On the first of July, 1881, a contract was entered into between the Western Union and the Union Pacific that superseded the several contracts which had heretofore governed the relations of the two corporations. The Central Branch Union Pacific was also covered by this contract.² As this instrument is the most important of those by which the relations of the bond-aided roads to their telegraphs are regulated, its provisions may be given with some fullness.

It is declared in the preamble that the purpose of the contract is to terminate existing disputes and litigation, and it is agreed that all liabilities under the old contracts are to be released, and all suits dismissed, at the conclusion of the new. The Union Pacific grants to the Western Union, “so far as it legally may,” the exclusive right of way along and under its

¹ See *supra*, p. 192.

² The bond-aided lines constitute only a part of the railroad mileage covered by this contract.

roads and bridges, and agrees not to "furnish for any competing line any facilities or assistance that it may lawfully withhold." The Western Union is guaranteed the use of the railway company's depots and stations as against any other telegraph company, and the employees of the Union Pacific are forbidden to work for or have any connection with any other telegraph company. The claims of the Western Union under the nineteenth section of the act of July 1, 1862, and the fourth section of the Idaho Act are not admitted by the Union Pacific, and the contract provides that during its continuance they are to remain in abeyance.

For the maintenance and extension of existing telegraph lines along the railroads of the Union Pacific system, and for the construction and maintenance of new lines of telegraph along extensions of the railroads of the system, the railway company is to supply all the labor except a foreman, and the railway company and the telegraph company are to share equally the cost of poles, wires, insulators and other material. This arrangement, however, extends only to the erection of three wires for the exclusive use of each party between Council Bluffs and Ogden, two between Kansas City and Denver and one on the other roads of the system. If either party wishes more wires, it must erect them wholly at its own expense. The telegraph company is to furnish the instruments, batteries, blanks and stationery for public business, and the railway company is to afford free freight transportation for telegraphic materials and supplies, and free passenger transportation for officers of the Western Union traveling on the company's business and for all employees of the Western Union traveling on business concerning the telegraphs along the Union Pacific. The telegraph business of the Union Pacific beyond its own lines the Western Union agrees to do without charge to the amount of \$25,000 per year for the first 3400 miles of railroad owned or controlled by the Union Pacific and occupied by telegraph lines under the provisions of this contract, and to the amount of six dollars per year for every additional mile of railroad so owned or controlled and occupied.

Business in excess of this shall be paid for at half commercial day rates. Besides, the Western Union agrees to give the Union Pacific, for corporation purposes, the use of a wire from Omaha to Kansas City, connecting with the Union Pacific stations along the way. The payment of all taxes on telegraph property owned by either party is assumed by the Western Union. Both parties may retain their present telegraph offices, and either party may establish as many new offices as it wishes, subject to the following conditions: If the Western Union has no office in a given place and the railroad company has one, the Western Union may not establish another within a mile of the railway company's office without the consent of the railway company. If, however, the telegraph business of this locality is confined to the mile limit and the railway company's service is not satisfactory, the Western Union may enter the limit with an office of its own, if the consent of the arbitrators to whom the matter shall be referred can be obtained.

The railway company agrees that its employees shall not compete with the telegraph company's offices in the transaction of commercial telegraph business at any point where the telegraph company may now or hereafter have an office separate from the railway company's office, by cutting rates or by active efforts to divert business from the telegraph company.

A superintendent of all the telegraph lines on the Union Pacific, whether owned by railway or telegraph company, is to be "appointed and paid jointly," with the expectation that he will endeavor to serve and harmonize the interests of both parties. In fact,

it is mutually understood and agreed that all of the telegraph lines and wires covered by this contract, whether belonging to or used by the telegraph company or the railway company . . . shall form part of the general system of the telegraph company.

The preamble recites as one of the purposes of the contract that of

fulfilling the obligations of the railway company to the government of the United States and the public in respect of the telegraph service required by the act of Congress of July 1, 1862, and the amendments thereto.

And with a very obvious reference to the ground of unfaithfulness to charter obligations on which the superseded contracts had been declared void, the new instrument provides that the railway company shall transmit, at rates fixed by itself, all commercial messages presented at its offices. One-half of the receipts of such business, however, are to be turned over to the Western Union. The provision that the Union Pacific shall fix its own rates would seem to apply only to the main line between Council Bluffs and Ogden; but the provision is of little importance, since the Union Pacific is bound by the contract not to cut rates.

This contract is drawn for twenty-five years, but it cannot be terminated at the end of that time, or even at a later date, except by a year's previous notice. Disputes as to its true intent and meaning are to be settled by arbitration. If the Union Pacific fails to keep this contract, then the superseded contracts with the individual roads shall again come into force.

The validity of this new contract became a subject of legislative consideration, when a new rival of the Western Union, the Baltimore and Ohio Telegraph Company, began to seek connections beyond the Missouri River. Now, however, in distinction from the situation when the American Union had the same design, the Union Pacific Railway was favorable to the Western Union's monopoly. The matter on this occasion never got into the courts, but was settled, as in the earlier case, by consolidation of the telegraph companies. Before the settlement was reached, however, the general subject of the relation of the bond-aided roads to their telegraphs had undergone considerable investigation.

In consequence of a resolution of the United States Senate, passed February 20, 1885, asking for information as to the telegraphic business of the bond-aided roads, the commissioner of railroads gave a hearing, February 27, to representatives of

the corporations interested.¹ A year later, February 26, 1886, the House of Representatives passed a resolution empowering the committee on post-offices and post-roads

to ascertain whether additional legislation is needed to prevent a monopoly of telegraphic facilities; to secure to the Southern, Western, and Pacific States the benefits of competition between the telegraph companies; and to protect the people of the United States against unreasonable charges for telegraphic services.

The committee conducted an investigation in March and April and made a report to the House on the 22d of the following December.² The testimony taken was quite voluminous, but it was almost all given by counsel and officers of the Union Pacific, the Western Union and the Baltimore and Ohio. In fact, the controversy between the rival telegraph companies was the source both of the hearing before the commissioner of railroads and of this investigation by the House committee. Nevertheless, valuable information was brought out concerning the telegraph of the Union Pacific, and some light was thrown on the legal aspects of this company's relations to the government and to the Western Union.

The difficulties of the Baltimore and Ohio arose from the fact that the Western Union refused to take its business to points beyond the Missouri at less than the regular rates to individual customers. But access to the western territory under conditions that would admit of competition with the Western Union would be gained, if the bond-aided roads could be induced or compelled to make traffic arrangements with the Baltimore and Ohio for an exchange of general telegraph business on the same terms and conditions as to rates, accounts and mechanical connections as were enjoyed by the Western Union. Accordingly, the Baltimore and Ohio demanded such arrangements for itself,³ but the Union Pacific refused to make them, maintaining that its duty to the Baltimore and Ohio was only its duty to an individual customer.

¹ Senate Ex. Doc., 48th Cong., 2d sess., No. 105.

² House Reports, 49th Cong., 2d sess., No. 3501.

³ *Ibid.*, pp. 251-257.

The Baltimore and Ohio based its claim to equal treatment with the Western Union, first, on the fifteenth section of the act of July 2, 1864. This section required the companies

to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line ; and in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others.

Discussion made clear, and the counsel of the Baltimore and Ohio were compelled to admit, that the obligation here imposed applied to the bond-aided roads and telegraphs only as among themselves, and not in their relations to outside roads and telegraphs. Discrimination within the meaning of this prohibition had arisen in years past, but none such was complained of now. Neither was it claimed that the further requirement of the section — to receive and transmit all messages of like character by whomsoever offered — had been violated.

It being admitted that the statute did not require the bond-aided telegraphs to form continuous through lines with every connecting telegraph, a decision of the United States Supreme Court was cited to show that there was no such requirement by common law.

At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond that line, so that he may be required to carry in that way for all alike, he may, nevertheless, confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.¹

¹ D. & N. O. R. R. vs. A. T. & S. F. R. R., 110 U. S., 667.

That is, the duties of the Union Pacific as a common carrier in the transmission of telegrams were confined strictly to its own lines. In the matter of telegrams whose routes lay only partly over its lines it could make arrangements with the Western Union for their joint dispatch. And the Baltimore and Ohio could not as of right demand that such arrangements be made with it also.

The second point made by the Baltimore & Ohio as a basis for its demands was the alleged illegality of the contract of 1881 between the Union Pacific and the Western Union. This contract, it was held, was of a kind with the contracts which it superseded. These contracts had been declared void by the courts in 1880. Further adjudication was, therefore, unnecessary. All that was needed was a Congressional resolution requiring the Pacific roads to maintain and operate their telegraph lines themselves, and directing the railroad commissioner and the attorney-general to see that they did it.

The conclusions of the committee on post-offices and post-roads were highly unfavorable to the Pacific Railroad telegraphs. In its report to the House of Representatives, the committee held that the lines were not operated as was contemplated in the aiding acts, and that the companies, by their arrangements with the Western Union, had impaired the lien of the United States on their property, and at the same time had prevented the public use of their lines. Public use was the necessary implication from the fact that the government had aided in the construction of the lines.

The principle that governs the public use of any right or privilege is that it shall be equal for all and without discrimination. Equal privileges and equal facilities are fundamental conditions in the public use of anything. . . . In order that equal facilities may be extended to all and discrimination prevented, it becomes necessary, not only that individuals should be granted equal facilities, but that equal rights and facilities should be extended to connecting railways and connecting telegraph lines.

Whence it followed that those who reached the Pacific roads over the Baltimore and Ohio were discriminated against, as com-

pared with those who reached them over the Western Union.¹ In pursuance, therefore, of the government's duty "to see that the terms and conditions upon which the grants of public aid were made are fulfilled," the committee submitted and recommended for passage a bill, of which the following were the principal requirements:

(1) That all railroad companies to which the United States had granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, and all companies engaged in operating said railroads, should

forthwith and henceforward, by and through their own respective corporate officers and employes, construct, maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid.

(2) That all telegraph companies which had accepted the provisions of the act of July 24, 1866, should be permitted to connect their lines with the telegraph lines of the government-aided railroads for the interchange of business, and should without discrimination be accorded the same terms and facilities therefor.

(3) That the attorney-general, in order to secure the lien of the United States upon the bond-aided Pacific telegraphs, and "to have the same possessed, used and operated" in conformity with the acts of Congress concerning them, should "by proper proceedings" enforce and defend the rights and equities of the United States in said telegraphs; that he should "legally ascertain and adjudicate" the rights of third parties therein; and finally, that he should have all illegal and *ultra vires* contracts made by the companies annulled.

The enforcement of the first and second requirements was entrusted to the commissioner of railroads, who, on complaint of their violation, was directed to ascertain the facts and

¹ This latter conclusion of the committee is obviously in direct conflict with the opinion of the Supreme Court cited above.

report them to the secretary of the interior. When the decision of the secretary was made, the commissioner was to carry it out, employing, if necessary, mandamus or other legal process. In addition, for failure or refusal to observe these requirements, the aggrieved party might prosecute the offending official by penal suit, and the company itself by civil suit.

Section seven of the act required the making of certain reports to the commissioner of railroads : first, reports within sixty days on the telegraph property along the government-aided railroads and on all contracts and agreements respecting the same ; and, secondly, annual reports on the condition, value and earnings of the telegraphs.

This measure, known as the Anderson Bill, was not acted upon by the Forty-ninth Congress. It was taken up and passed, however, by the succeeding Congress, and became law on the 7th of August, 1888. In but a single point of consequence did the final form of the bill differ from its original provisions : the duties which were at first assigned to the commissioner of railroads and the secretary of the interior were ultimately devolved upon the Interstate Commerce Commission, and this body was authorized to institute inquiries upon its own motion as well as upon complaints laid before it. A considerable opposition to the bill was developed during its discussion. Objection was made to the measure, first, as unwise, and second, as unconstitutional. As unwise, because the abrogation of the contract with the Western Union and the operation of its telegraph by the Union Pacific itself would decrease its earnings from this source, which decrease would issue in loss to the government, its largest creditor. As unconstitutional, because the contract was legal, having been made under section 19 of the act of 1862, and what had been acquired under it possessed all the sacredness of vested rights. On the other hand some sentiment favorable to government ownership of the telegraph, founded on a just conception of the nature of monopolies, was disclosed by the debate, while again the common fear and hatred of monopolies were conspicuous. These latter feelings

found much nourishment in the fact that, after the introduction of the bill in the Forty-ninth Congress, the Baltimore and Ohio Telegraph Company, to whose influence had been due the investigation leading to the bill, had succumbed to the Western Union and had been absorbed by it. It was argued that if the Anderson Bill had been on the statute-book, this extinction of competition would not have taken place.

It would seem in the light of the judicial interpretation of the Pacific Railroad laws found in the decisions reviewed above, that the only new law made by this act, the only new rights created and obligations imposed (with some obvious minor exceptions), are contained in the requirement that any telegraph company which has accepted the provisions of the act of July 24, 1866, on extending its line to meet the line of a government-aided railroad, shall be permitted to form connections and interchange business with the latter ; and that, on terms as favorable as are extended to any other telegraph company. As we have seen, this is a statutory and not a common law obligation.¹ Having been imposed by act of Congress, its fulfillment now becomes incumbent on the railroads.

IV.

Is the Anderson Act observed? What are its results? The first question may be answered with a general negative. The very limited and partial extent to which the act has been observed will appear as we proceed. Its chief result up to the present has been the bringing of suits by the attorney-general to compel its observance. The issue of these suits is still in doubt ; for although the government has been successful so far, it will require the verdict of the higher courts to settle them definitively. As to the requirements of the act in regard to the making of reports to the Interstate Commerce Commission, these have not, on the whole, been complied with. In fact, as a rule, the railroad and telegraph companies ignore the requests

¹ *Supra*, pp. 205, 206.

of the commission for reports.¹ Nor has the commission been called upon to exercise its investigating powers. In its third annual report the commission said that it had never received either an application to make an investigation or a complaint against any subsidized company for refusing connection with other companies,

except a communication in the nature of a complaint from Albert B. Chandler, President and General Manager of the Postal Telegraph and Cable Company, in September, 1888. This led to a correspondence and inquiry which continued for some months, but no formal complaint or application followed.

The incident last referred to by the commission was connected with proceedings which brought before the courts the relation of the Union Pacific's contract of 1881 to the Anderson Act. Between November, 1888, and February, 1889, Mr. Chandler made application to the Union Pacific to enter into a traffic arrangement, whereby the wires of his company should be connected with the telegraph offices of the Union Pacific at Omaha and Kansas City, and an interchange of business made on through rates properly apportioned between the parties. But, as the Baltimore and Ohio had failed before, so the Postal failed now to secure such an arrangement, the Union Pacific pleading an injunction secured by the Western Union to restrain it from observing the Anderson Act.

On the 9th of November, 1888, President Green, of the Western Union, addressed a communication to President Adams, of the Union Pacific, in which he said: "I deem it my duty to inform you that this company is advised that its contract with your company, dated July 1, 1881, embodies rights which exclude that contract from the operation of [the Anderson Act]." He therefore insisted that the Union Pacific take no steps in derogation of that contract, "except as the result of proceedings in mandamus" provided

¹ See Third Annual Report of the Interstate Commerce Commission, pp. 35-38; Fourth Annual Report, p. 49; Fifth Annual Report, p. 10; Sixth Annual Report, p. 67.

for in the third section of the Anderson Act. President Adams replied that it was not for his company, in the face of an express mandate of Congress, to assume the existence of a superior binding power in the contract of July 1, 1881; that it would obey the Anderson Act "until otherwise directed by judicial determination . . . notwithstanding the existing contract"; and that it would not "await the result of mandamus proceedings." With the purpose of exercising "by itself alone all the telegraph franchises conferred upon it," the Union Pacific now proceeded, whether sincerely or not, to get ready to do a general telegraph business for the public. Blanks were to be prepared, batteries and appliances provided and additional wires strung, if necessary. The continuance in office of the joint superintendent provided for by the twelfth section of the contract with the Western Union being deemed a violation of the Anderson Act, he was removed and re-appointed superintendent of the telegraph system of the Union Pacific alone. How much further the Union Pacific might have gone in the effectuation of its professed purpose, cannot be known; for on February 14, 1889, an injunction was granted the Western Union by the circuit court for the district of Nebraska, restraining the Union Pacific from obeying the Anderson Act to the subversion of the contract of 1881. Application has never been made to dissolve this injunction. Indeed, in the bill filed by the United States against the Western Union and the Union Pacific in the suit which we are now to take up, it was charged that the injunction was the result of collusion between the two companies to escape compliance with the Anderson Act. But the charge was denied.

Pursuant to the fourth section of the Anderson Act, the United States, on September 17, 1889, brought suit in equity in the circuit court of the United States for the district of Nebraska, against the Western Union Telegraph Company and the Union Pacific Railway Company,¹ to have the contract of July 1, 1881, between the defendants canceled and annulled, and to oblige the Union Pacific to assume itself the full exer-

¹ 50 Fed. Rep., 28.

cise of its telegraph franchise. March 30, 1892, Justice David T. Brewer delivered an opinion favorable to the complainant. In accordance with this opinion, a decree was entered,¹ of which the important points are as follows :

(1) The contract of July 1, 1881, between the Western Union and the Union Pacific is annulled ; likewise that of September 1, 1869, and that of December 14, 1871, between the Union Pacific and the Atlantic and Pacific ; and that of October 1, 1866, between the Union Pacific Eastern Division (Kansas Pacific Railway) and the Western Union.

(2) The Union Pacific is directed to resume possession of all the telegraph property belonging to it situated on those of its lines, main and branch, which were aided by the government under the Pacific Railroad Acts ; to maintain and operate the same through its own officers and employees "for railroad, governmental, commercial, and other purposes" ; and "in all ways [to] exercise by itself alone all the telegraph franchises conferred upon it and obligations assumed by it" under the aforesaid acts, making no discrimination whatever as between ordinary patrons or as between connecting telegraph lines.

(3) The Western Union is ordered to vacate the offices of the Union Pacific and, until further order of the court, to remove nothing that has been used jointly or that is the subject of disputed ownership or difficult of identification or necessary to the railway company in the discharge of its enjoined duties ; it being provided, however, that the railway company may lease to the telegraph company such poles along its right of way and such space in its depots and stations as it does not need itself.

(4) Finally, the decree grants an appeal and provides for its own supersession pending such appeal, on the filing of bonds by the defendants.

The appeal granted by the last provision of the decree is now pending in the United States circuit court of appeals for the eighth circuit.

¹ Oct. 11, 1892.

An extended review of the suit is unnecessary, since much of the ground gone over has been covered by this article already. Justice Brewer's opinion does not traverse the opinions delivered by Judge McCrary and Justice Miller in the litigation twelve years before, except as to the competence of the United States Telegraph Company to transfer to the Western Union the franchise granted to it by the Idaho Act to build a telegraph line to the Pacific. This competence was not called in question in the earlier case, the court seeming concerned only about matters of fact. Justice Brewer, on the contrary, accepts the fact of transfer, probably because of fuller knowledge, but denies the competence.

The privilege given by the Idaho Act [he says] was personal to the United States Telegraph Company. It was not to it and its assigns, or to it and its successors. The general rule is that the grant of a franchise of a public nature is personal in its character and incapable of transfer, without the sanction of the government making the grant, to any other person or corporation. It creates a contract between the government and its grantee, and on the part of the latter carries with it the obligation that it will personally discharge the duties and exercise the rights of the franchise.

To the argument that Congress must have known that the New York law permitted the consolidation of corporations,¹ and that it "therefore impliedly consented to any such subsequent transfer of the franchise . . . to any company into which the United States Telegraph Company might lawfully be consolidated," Justice Brewer replies that the argument has force when the thing transferred is tangible property, but not when it is intangible property: ". . . there is an element of personality of obligation in a franchise which is not found in a grant of tangible property." Furthermore, the designation of the Idaho Act as "An act for increased facilities of telegraphic communication between the Atlantic and Pacific States and the Territory of Idaho"; the improbability that Congress would grant to a company (the Western Union) having one line to

¹ The Western Union and the United States Company were both New York corporations.

the Pacific the right to build and operate another line ; and the fact "that it named another, an independent company," — are "evidence that competing lines were its purpose ; and with that purpose obvious on the face of these statutes, it cannot be that by consolidation this purpose could be frustrated."

But it is not only the transfers of telegraph franchises under the fourth section of the Idaho Act that have all ground of legality cut from under them. The same thing is done by Justice Brewer for contracts of like aim resting for their validity on the nineteenth section of the act of July 1, 1862. That act and section offered the Pacific roads the alternatives of constructing and operating their own telegraphs, or substituting by arrangement the telegraphs of the overland companies. There may be some uncertainty as to the content of the latter alternative. But it makes no difference, as the railroads accepted the former and built their own telegraphs. Having done that, they cannot, the court holds, expect by a contract with the overland companies or their successor, the Western Union, to profit by the second alternative and divest themselves of the obligation to maintain and operate telegraphs.

The attempt of the defendants to bring the contract of 1881 within the permissive powers granted by section four of the Idaho Act and section nineteen of the act of 1862 thus being shown vain, there was nothing to hinder the full and complete application of the principle of the inalienability of a public franchise. Accepting this principle unreservedly, the court pronounced the contract of 1881 *ultra vires* and void.

Justice Brewer declared very emphatically that the contract of 1881 was meant to transfer and had transferred the telegraph franchise of the Union Pacific to the Western Union. For, though counsel maintained that the Union Pacific had not disabled itself from doing a general telegraph business, yet even the testimony of their own witnesses went to prove that it did little or no business but its own — that indeed it did not have the facilities to do anything more. Such a transfer of its franchise

was beyond the authority conferred by the acts of 1862 and 1864 ; and yet, to prevent any doubt, the government, in the exercise of its reserved power to alter and amend, by the act of 1888 in terms has commanded the railway company to exercise all the duties of its telegraphic franchise, and forbidden the performance of those duties by any other company and through any other instrumentality than the direct servants and employees of the railway company. [This act of 1888 is] a valid exercise by Congress of its power to alter and amend. It does not purport to grant a new or take away an old franchise. It attempts simply to regulate the manner in which a franchise already granted and possessed shall be exercised ; and surely the power to regulate the manner of exercise is within the reserved power to alter and amend.

It was urged in defense of the contract of 1881 that its effect was beneficial both for the railway company, for the government and for the public. The revenues of the company from the telegraph were increased ; and the Western Union, with its extensive connections, unlimited facilities and exclusive devotion to telegraphy, was able to give the public better service than the Union Pacific, first and paramountly a railroad, could possibly furnish. Being undisturbed, as he says, "by the hue and cry about monopoly," Justice Brewer is fain to admit the force of this contention, but he denies its relevancy. It might be a better policy not to interfere with the contract between the Western Union and the Union Pacific, but a court has to do with rights, not with policies. Policies belong to the legislature. Given the validity of the Anderson Act, and the court has nothing to do but enforce it.

Proceedings under the Anderson Act have been entered upon against a number of railroads besides the Union Pacific. In several suits in the circuit court for the northern district of California, the government has been successful on the preliminary issues,¹ but the main issue is yet pending. Suits have also been begun against the Sioux City and Pacific, in Iowa, and against the Northern Pacific, in Minnesota.

¹ 49 Fed. Rep., 297, 304.

V.

No study of the government's policy in reference to the bond-aided roads would be complete without a consideration of the attitude of the administrative officials whose duties bring them in contact with the corporations. The rulings of the second comptroller of the treasury are the most important in this connection. The opinions of the attorney-general, as having influenced the rulings of the comptroller, must also be noticed.

On the 31st of May, 1872, the second comptroller made a ruling, agreeably to section five of the act of July 2, 1864,¹ that one-half of the compensation for government dispatches sent by the Central Pacific telegraph (Ogden to San Francisco) should be withheld.² In the following December and February the same rule was applied to telegrams transmitted over Atlantic and Pacific³ and Western Union wires along the line of the Union Pacific and the Central Pacific (Omaha to San Francisco). But in deference to the opinion⁴ of the attorney-general this ruling was revoked as far as concerned the Western Union, with the construction of whose line, although it occupied their right of way, the railroad companies had had nothing to do. The acquisition of the railroad lines of telegraph by the Western Union was yet to come. The comptroller likewise followed the attorney-general in his opinion⁵ that one-half of the compensation for government business done by the Kansas Pacific

¹ *Supra*, p. 186.

² For application to the bond and interest account of the Central Pacific.

³ January 15, 1872, the comptroller had ruled that a claim of \$120.68 for telegraphic services presented by the Atlantic & Pacific, as the purchasers of the Union Pacific telegraph by the contract of September 1, 1869, could not be paid to the Atlantic & Pacific, but must be paid to the Union Pacific; and then not the whole of the claim, but only a half, the other half being applied to the bond and interest account of the Union Pacific. Later legal opinions and judicial decisions but reproduced the thought of this ruling, which was that Congress in the Pacific Railroad Acts did not create separately a railroad and a telegraph company, but a company charged with both railroad and telegraphic functions, and that this company could not alienate its telegraph franchise.

⁴ Rendered January 16, 1873.

⁵ Rendered October 13, 1873.

telegraph should be retained. The attorney-general postulated that the Kansas Pacific, in making the contract of October 1, 1866, by which it secured a telegraph line operated by the Western Union, had rejected the alternative offered by section nineteen of the act of 1862 and had itself assumed the performance of the obligations imposed by Congress in respect to a telegraph. The transmission of government telegrams on certain conditions as to compensation was one of these obligations, and it devolved upon any company to which the Kansas Pacific might assign the operation of the telegraph. The obligation, therefore, had devolved upon the Western Union, and the government should keep back from the Western Union one-half of the compensation for sending its telegrams over the Kansas Pacific.

The rulings just given were made before the telegraphs of the Union Pacific (main line) and the Central Pacific came into the hands of the Western Union by the contracts of 1877 and 1881. The most important ruling since the contracts is that made by Comptroller Isaac H. Maynard, December 2, 1885, and promulgated December 26, as General Army Order No. 124. Its most important provision is this :

If the Western Union Telegraph Company (or other independent companies) builds and maintains a telegraph line which runs alongside of and occupies the same territory as the bonded Pacific Railroads, it is intended that army paymasters shall refuse payment to said independent companies for messages received or sent over such lines.¹

The basis for this ruling is found in a letter of Comptroller Maynard to Secretary of the Treasury Manning, February 5, 1886, in which the writer held that in the contracts by which the Western Union acquired the telegraph lines of the Pacific roads, it assumed all the burdens and liabilities respecting a telegraph imposed upon these roads by acts of Congress, and that the rights of the United States were in no way affected or prejudiced. Consequently, the compensation for government

¹ Note that the *whole* of the compensation for messages was to be retained. This was after the passage of the Thurman Act. *Supra*, p. 186, note 4.

telegrams should still be retained and applied to the bond and interest and the sinking fund accounts, just as if the roads themselves were administering their telegraphs. Indeed, if the government officials did not withhold such payments, they were violating a plain command of law. This reasoning, it will be remarked, is similar to that employed by the attorney-general in his opinion of October 13, 1873, favoring the retention of compensation for government dispatches over the Kansas Pacific. The comptroller, without calling in question the validity of the contracts between the Pacific roads and the Western Union, met this exigency of administration, it would seem, in the best practicable way, and adopted the most efficacious means to protect the rights of the government and secure the continuance of sinking-fund and bond and interest payments, so far as they are affected by the rendering of telegraphic service to the government.

This ruling of Comptroller Maynard has been followed¹ in settling the accounts, not only of army paymasters, but of all disbursing officers who come under the jurisdiction of the second comptroller's office. Later comptrollers, re-affirming the principle of Comptroller Maynard's ruling, have, in the spirit of Justice Brewer's recent decision, given expression to the view that the Western Union is the lessee and practical owner of the Pacific telegraphs for all purposes except the transaction of railroad business. Accordingly they have insisted on treating the Western Union as the real creditor for telegraphic services rendered the government, and have refused to receive accounts in the name of the railroads.² Adhering rigidly to the idea that the Western Union has stepped into the shoes of the Pacific railroads, they have compelled the Western Union to forego payment for government dispatches, crediting the amounts so withheld to the accounts of the railroads.

¹ *I.e.*, until very recently. See *infra*, p. 220.

² Contrast this with the refusal of the comptroller in 1872 to recognize the Atlantic & Pacific Telegraph Company, the lessee of the Union Pacific telegraph, as the creditor for telegrams sent over the leased line. *Supra*, p. 216. But the compensation withheld goes now, as it went at that time, to the credit of the railroad.

But, instead of making the credits at regular commercial rates, which are the rates at which the railroads are required by the original Pacific Railroad Act to serve the government, the comptroller has made them merely at the rates annually fixed by the postmaster-general, which are much lower than the commercial rates. The Western Union, having accepted the conditions of the act of July 24, 1866, is amenable to these rates, but the Pacific railroads are not. The government thus appears to have taken an unfair advantage of the roads. As long as they are permitted to shift the transmission of government telegrams on to the Western Union, they ought to be credited at the rates which they could demand if they performed the service themselves.¹

Prior to the ruling of Comptroller Maynard in 1885 large payments had been made to the Western Union which under this ruling would have been withheld. Comptroller Maynard estimated the total of such payments at \$150,000. Claims to the extent of \$12,495.62 against the Union Pacific and of \$5,665.24 against the Central Pacific were definitely formulated. The Western Union refusing to refund these moneys, resort to the courts was determined upon. Accordingly, suit was brought against the Union Pacific in the circuit court for the southern district of New York,² and was decided February 16, 1891. Not attempting to pass upon the validity of the contract of 1881, the court held that it did not disable the Union Pacific from sending dispatches for the government. But, when sending the dispatches in question, the government officials had given no directions whatever for their transmission over railroad wires ; had indeed handed them in written on Western Union blanks. The presumption, then, was that they were to be sent by Western Union wires. Moreover, when so sent, the government enjoyed the low rates fixed by the post-

¹ There is an opinion of the attorney-general rendered in 1879, during the lease of the Union Pacific telegraph to the Atlantic & Pacific, that would support the practice of the second comptroller's office. The opinion held that the rates for the Union Pacific, controlled by the Atlantic & Pacific, might be fixed according to the act of 1866.

² *United States vs. Union Pacific Railway Co. et al.*, 45 Fed. Rep., 221.

master-general. It was, therefore, adjudged that the Western Union should keep the money paid for sending these telegrams. Evidently, the court in this case did not see in the arrangement existing between the Union Pacific and the Western Union that more or less complete alienation of the former's franchise which Justice Brewer and the comptrollers saw. The case, however, has been appealed to the Supreme Court.

A recent opinion of the attorney-general — May 5, 1893 — respecting the payment of a bill presented by the Western Union for messages sent over wires on routes of bond-aided Pacific roads, follows the decision just given, and recommends that payment for all such messages be withheld until the final determination by the higher courts of this case and of the case appealed from Judge Brewer — which recommendation the secretary of the treasury has directed the second comptroller to observe. This constitutes a reversal of the policy followed in the comptroller's office since Mr. Maynard's ruling, although as to actual change there is little.¹ Formerly, when compensation for telegrams was retained, it was credited to the account of the roads ; now all action is suspended until the decision of the courts shall have been rendered.

A ruling of February 7, 1893, promulgated by the first comptroller and followed by the second comptroller, prescribes the method of settling for government telegrams sent partly or wholly over bond-aided lines. The agent of the government sending the telegram may not pay for it, but the company must present its account to the proper department of the government, for the approval of the head of the department. The account is then to be transmitted to the accounting officers of the treasury for settlement. If the telegram was sent wholly over the line of a bond-aided road, the entire amount shall be retained and applied to the payment of the road's indebtedness to the government. Otherwise only so much shall be retained as the ratio of aided to unaided route requires. This order also instructs government agents, where practicable, to send telegrams by aided lines.

¹ Treasury Circular, No. 19.

VI.

Under the contract of December 14, 1877, the Western Union pays annually to the railroad companies, parties to the contract, \$100,000. The Central Pacific's share of this is \$48,000, of which \$30,120 are assigned to the bond-aided portion¹ of the road. This latter sum, therefore, goes annually to the debit side of the account, in ascertaining the net earnings which are subject to the percentage payment to the government.

The contract of the Union Pacific with the Western Union does not provide for an annual rental payment, but one-half of the cash receipts for commercial telegrams sent from Union Pacific offices goes to the Union Pacific. These receipts have been as follows :²

1879	.	.	.	.	.	.	.	\$6,419.52
1880	.	.	.	.	.	.	.	34,908.87
1881	.	.	.	.	.	.	.	23,464.61
1882	.	.	.	.	.	.	.	26,011.82
1883	.	.	.	.	.	.	.	22,649.53
1884	.	.	.	.	.	.	.	22,095.89
1885	.	.	.	.	.	.	.	17,135.48
1886, incomplete report.								
1887	.	.	.	.	.	.	.	5,674.72
1888, incomplete report.								
1888-89 (June 30 to June 30)	.	.						24,459.99
1889-90	.	.	.	.	.	.	.	51,141.29
1890-91	.	.	.	.	.	.	.	61,589.39
1891-92	.	.	.	.	.	.	.	52,299.88

The receipts for 1879 are those of the Union Pacific Railroad ; for 1880 and subsequent years the figures relate to the Union Pacific Railway ; the consolidation of the Union Pacific Railroad, the Kansas Pacific Railway and the Denver Pacific

¹ That portion comprises 860.66 out of a total of 1,360.28 miles.

² These figures were taken from the reports of the Union Pacific to the commissioner of railroads, whose office was not created until 1878.

Railway having taken place January 24, 1880. Of the 1,821.86 miles in the system, 1,428.43 are bond-aided. The receipts from telegrams sent over the bond-aided portion of the railway are subject to the government requirement in respect to a percentage payment of net earnings. When telegrams are sent partly over the aided and partly over the non-aided portion, each portion is assigned its *pro rata* share of the receipts.

The amounts in the table of earnings credited to their telegraphs by the Union Pacific and the Central Pacific are small compared with some other items of revenue. But these direct money earnings do not exhaust the benefits the roads receive from their contracts with the Western Union. What these different benefits are may be seen by reference to the contracts.¹ Important among them is the free service over the Western Union wires throughout the country, which is enjoyed by the Union Pacific up to a certain amount and by the Central Pacific without limit. Aside from the gratuitous element in this service, the value in the administration of a railroad of membership in the Western Union system, with its immense facilities and its lines extending to every part of the land, must be very great and the earning power of the road must be greatly enhanced thereby. So that the relinquishment of earnings in one direction may be largely compensated by the increase of earning power in another. Indeed, it may well be doubted whether, with the Western Union competing with them and putting in offices where it had none before, the Pacific roads would derive from their telegraphs any profit whatever.

These considerations render it probable that the government, as a creditor of the bond-aided Pacific roads, loses nothing by the transference of their telegraph franchises. For, since the companies still retain their property rights in the telegraphs, the government's lien upon them is not impaired. And if, as we have seen seems likely, the contracts with the Western Union enhance the earning power and with it the value of the

¹ There are of course reciprocal obligations.

railroad plants, the annual payments to the government on account of railroad earnings are increased and the government's lien upon the railroads made of greater worth.

This investigation has revealed an apparently irresistible tendency towards the absorption of the Pacific telegraphs by the Western Union ; for, if not built in conjunction with the Western Union, they were soon transferred directly or indirectly to this great corporation. Adverse judicial decisions, even when based on the great legal principle of the inalienability of a public franchise, have not stopped this process of absorption. That the higher courts, in the great case¹ now awaiting their consideration, will confirm the decision of the lower court, seems likely.² But that existing arrangements will even then really be terminated, would be a rash prediction in the face of the powerful economic forces at work tending to consolidation and monopoly. For, whatever may have been the immediate occasion of the existing arrangements, they are no doubt attributable ultimately to the influence of these forces.

LUCIUS S. MERRIAM.

CORNELL UNIVERSITY,
ITHACA, N. Y.

¹ *United States vs. Western Union and Union Pacific* is referred to.

² [The decision of the Circuit Court of Appeals on the appeal from the judgment of Justice Brewer was rendered January 29, 1894 (*U. P. Ry. Co. vs. U. S.*, 59 Fed. Rep., 813). The decision reversed the judgment of the lower court, holding (1) that the contract of 1881 was not beyond the power of the railway company, either as divesting it of its telegraphic franchise, or as disabling it to discharge its public duties; (2) that the privileges conferred by the contract on the Western Union exclusively were not such as the railway company was bound at that time to confer equally on all other telegraph companies, though since the Anderson Act this is probably not the case; (3) that the contract of October 1, 1866, was valid; and (4) that the duty of the Pacific Railroad Companies to afford equal telegraph facilities to all connecting lines must be enforced, not by a bill in equity, but by application to the Interstate Commerce Commission. — Eds.]